Malayan Banking Bhd v Worthy Builders Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1724–08 OF 2013

MOHD HISHAMUDIN YUNUS, HAMID SULTAN AND BADARIAH SAHAMID JJCA

13 FEBRUARY 2015

Banking — Banker and customer — Loan facilities — Security — Assignment of proceeds — Failure to give notice of assignment in the agreed manner — Whether assignment bad in law

Banking — Banker and customer — Loan facilities — Security — Assignment of proceeds — Nature of a security document — Whether security document forms primary contractual relationship between lender and the borrower — Whether security document only comes into effect when there is a default — Whether assignment deeds and power of attorney placed obligation on bank to act to recover proceeds — Whether legal obligation on bank to enforce the securities immediately upon default

KUB Realty Sdn Bhd ('KUB') was awarded a contract to build an UMNO building and KUB subcontracted it to Warisan Nusa Sdn Bhd ('Warisan') and Warisan subcontracted it to Worthy Builders Sdn Bhd ('Worthy'). The appellant bank had given facility to Worthy in the sum of RM6m and as security for the facility had obtained an assignment of proceeds for work to be done by Worthy for the UMNO building. KUB assigned the contract proceeds to Warisan. Warisan had given an irrevocable letter to KUB to channel the assigned proceeds to the 'Warisan designated collection account in the Bank'. Worthy in turn instructed Warisan to pay the contract proceeds to 'Worthy's designated collection account in the Bank'. Therefore, there were two collection accounts, one for Warisan and the other for Worthy. The purpose was to allow the Bank to take money from Warisan's account and place it at Worthy's account. As KUB had assigned its proceeds to Warisan, Warisan instructed UMNO to pay the progress payments directly to 'Warisan designated collection account'. For providing the facility to Worthy, the Bank had obtained an assignment of all the proceeds to be received from Warisan as part of the security document. A power of attorney ('PA') was given by Worthy to the Bank to enforce whatever rights Worthy will have in collecting payments from Warisan. Warisan also had assigned its proceeds coming from UMNO to the Bank and also executed a PA in favour of the Bank. If all progress payments due from UMNO had landed in the 'Warisan designated account' and split and placed in the 'Worthy designated account', there would not have been any

default on the part of Worthy to the Bank. However, only some progress payments were paid into the designated accounts and there were some payments made by Warisan directly to Worthy. Notwithstanding the fact that Worthy had not strictly followed the contractual arrangement and had received payments directly from Warisan, Worthy had filed this suit on the basis that as Worthy and Warisan had assigned the contract proceeds with a PA, in consequence, the Bank had a duty and obligation to sue Warisan as well as the relevant parties under Warisan assignment to the Bank using the PA. Worthy's argument succeeded before the learned High Court judge ('the judge') and the judge ordered the Bank, Warisan and KUB to pay Worthy a sum of RM13,122,807.09. The Bank's claim against Worthy and the guarantors for the facility provided was dismissed. Hence the present appeal by the Bank against that decision. The issues arising for determination were: (a) whether the relevant assignment deeds and the PA placed an obligation on the Bank to act to recover the proceeds contractually and/or as a fiduciary; and (b) whether the Bank's claim could be dismissed when the issue of liability was not in dispute.

Held, allowing the appeal and allowing the counterclaim of Bank with costs:

(1) A security document means a document that provides a security interest in the property or asset (whether tangible or intangible) that is pledged as collateral. In the event the borrower defaults, then the security document is acted upon at the discretion of the lender to salvage whatever losses incurred. In essence, the security document does not form the primary contractual relationship between the lender and the borrower. It only comes into effect when there is a default (see para 11).

(2) The facility agreement made it clear that (a) the deed of assignment of contract proceeds; and (b) the deed of assignment of master contract proceeds were only security for the facilities. Only upon default of the borrower, the securities became enforceable and there was no legal obligation to enforce the securities immediately upon default. There were no provisions in the facility agreement and the security documents that stipulated that, upon default of Worthy or other parties, the Bank must act immediately upon the security documents and/or was obliged in law to act upon the instruction of Worthy to realise their debts through the security documents (see paras 29–30).

(3) Worthy did not give 'notice of assignment' in the manner as per the form agreed by the parties, as set out in the First Schedule to the deed of assignment of contract proceeds. Neither was there evidence to say the lender had consented to the variation of the notice of assignment. The assignment notice was not in compliance with sections 2 and 3 of the deed of assignment. In consequence, the assignment was bad in law (see paras 31–32).

(4) The deed of assignment which was intended as a security document, did not prohibit the assignor (Worthy) from obtaining the consent from the assignee to sue the debtor and it has been the accepted practice and have obtained judicial recognition. The assignor's right to sue was protected and there was no necessity in law or equity to find fault with the Bank when Worthy itself could have sued with the consent of the Bank, or could have made the Bank one of the defendants (see paras 33–34).

(5) The assignment is bad in law and in consequence, the judgment against the Bank for the sum of about RM13m, etc could not be sustained (see para 35).

(6) It was also clearly the intention of the parties that the deed of assignment, etc were continuing security and were never meant to be the primary contractual documents. This is set out in section 5 of the deed of assignment (see para 36).

(7) The judge ought to have allowed the Bank's claim against Worthy and the guarantors anchored as a counterclaim based on the pleadings, evidence and the law. No evidence was adduced by Worthy or the guarantors of the disputed sum relating to the facility agreement which they had to pay. The demand notices on the guarantors were served according to law and the submission of the Bank on this issue had merit (see para 38).

[Bahasa Malaysia summary

KUB Realty Sdn Bhd ('KUB') telah diawardkan kontrak untuk membina bangunan UMNO dan KUB telah memberikan subkontrak kepada Warisan Nusa Sdn Bhd ('Warisan') dan Warisan telah memberikan subkontrak kepada Worthy Builders Sdn Bhd ('Worthy'). Perayu, Bank telah memberi kemudahan kepada Worthy sejumlah RM6 juta dan sebagai sekuriti untuk kemudahan itu telah memperoleh penyerahan hak hasil untuk kerja yang patut dilaksanakan oleh Worthy untuk bangunan UMNO itu. KUB telah menyerah hak kontrak hasil itu kepada Warisan. Warisan telah memberikan surat yang tidak boleh dibatalkan kepada KUB untuk menyalurkan hasil yang diserah hak itu kepada 'Warisan designated collection account in the Bank'. Worthy sebaliknya telah mengarahkan Warisan untuk membayar kontrak hasil itu kepada Worthy's designated collection account in the Bank'. Oleh itu, terdapat dua akaun kutipan, satu untuk Warisan dan satu lagi untuk Worthy. Oleh kerana KUB telah menyerah hak hasilnya kepada Warisan, Warisan telah mengarahkan UMNO untuk membayar bayaran ansuran terus kepada 'Warisan designated collection account'. Bagi memperuntukan kemudahan kepada Worthy, bank telah memperoleh penyerahan hak untuk kesemua hasil yang patut diterima daripada Warisan sebagai sebahagian daripada dokumen sekuriti. Surat kuasa wakil ('SKW') telah diberikan oleh Worthy kepada bank itu untuk menguatkuasakan apa pun hak yang diperoleh Worthy daripada kutipan bayaran daripada Warisan. Warisan juga telah menyerah hak hasilnya

yang datang dari UMNO kepada bank itu dan juga telah menyempurnakan SKW menyebelahi bank itu. Jika semua bayaran ansuran yang kena dibayar dari UMNO telah dimasukkan ke dalam 'Warisan designated account' dan dibahagikan dan diletakkan dalam 'Worthy designated account', tidak mungkin berlaku kegagalan di pihak Worthy kepada bank itu. Walau bagaimanapun, hanya beberapa bayaran ansuran yang telah dibayar ke dalam akaun-akaun yang dinamakan itu dan terdapat beberapa bayaran yang telah dibuat oleh Warisan secara terus kepada Worthy. Walau apa pun fakta yang Worthy tidak mematuhi sepenuhnya aturan kontraktual itu dan telah menerima bayaran secara terus daripada Warisan, Worthy telah memfailkan guaman ini berasaskan bahawa kerana Worthy dan Warisan telah menyerah hak kontrak hasil itu kepada SKW, akibatnya, bank itu mempunyai kewajipan dan tanggungjawab untuk menyaman Warisan dan juga pihak-pihak berkaitan di bawah penyerahan hak Warisan kepada bank itu menggunakan SKW itu. Hujah Worthy berjaya di hadapan hakim Mahkamah Tinggi ('hakim tersebut') dan hakim tersebut telah memerintahkan bank itu, Warisan dan KUB membayar Worthy sejumlah RM13,122,807.09. Tuntutan bank itu terhadap Worthy dan penjamin-penjamin bagi kemudahan yang diperuntukan itu telah ditolak. Justeru rayuan ini oleh bank itu terhadap keputusan tersebut. Isu-isu yang timbul untuk ditentukan adalah: (a) sama ada surat ikatan penyerahan hak berkaitan dan SKW itu meletakkan satu kewajipan ke atas bank itu untuk bertindak mendapat semula hasil secara kontraktual dan/atau sebagai fidusiari; dan b) sama ada tuntutan bank itu boleh ditolak jika isu liabiliti tidak dipertikaikan.

Diputuskan, membenarkan rayuan dan membenarkan tuntutan balas bank dengan kos:

(1) Satu dokumen sekuriti bermaksud satu dokumen yang memperuntukan kepentingan sekuriti dalam hartanah atau aset (sama ada ketara atau tidak ketara) yang dicagarkan sebagai kolateral. Sekiranya peminjam gagal, maka dokumen sekuriti itu digunakan atas budi bicara pemberi pinjaman bagi menyelamatkan apa-apa kerugian yang terakru. Pendek kata, dokumen sekuriti tidak membentuk hubungan kontraktual utama antara pemberi pinjaman dan peminjam. Ia hanya berkuat kuasa jika berlaku kegagalan (lihat perenggan 11).

(2) Perjanjian kemudahan jelas menyatakan bahawa (a) surat ikatan penyerahan hak dan (b) surat ikatan penyerahan hak kontrak utama hasil hanya sekuriti untuk kemudahan itu. Hanya jika peminjam gagal, sekuriti itu boleh dikuat kuasakan dan tiada kewajipan sah untuk menguat kuasakan sekuriti dengan segera selepas kegagalan itu. Tiada peruntukan dalam perjanjian kemudahan dan dokumen sekuriti yang menetapkan bahawa, jika berlaku kegagalan oleh Worthy atau pihak-pihak lain, bank itu hendaklah bertindak dengan segera ke atas dokumen sekuriti dan/atau bertanggungjawab dari segi undang-undang

untuk bertindak atas arahan Worthy untuk merealisasikan hutang mereka melalui dokumen sekuriti (lihat perenggan 29–30).

(3) Worthy tidak memberikan 'notice of assignment' dalam cara seperti borang yang dipersetujui oleh pihak-pihak, seperti dinyatakan dalam Jadual Pertama kepada surat ikatan penyerahan hak kontrak hasil. Juga tiada keterangan untuk menyatakan pemberi pinjaman telah bersetuju kepada pengubahan notis penyerahan hak itu. Notis penyerahan hak itu tidak mematuhi seksyen-seksyen 2 dan 3 surat ikatan penyerahan hak itu. Akibatnya, penyerahan hak itu tidak baik dari segi undang-undang (lihat perenggan 31–32).

(4) Surat ikatan penyerahan hak yang diniatkan sebagai dokumen sekuriti, tidak melarang pemberi serah hak (Worthy) daripada memperoleh persetujuan daripada penerima serah hak untuk menyaman penghutang dan ia telah menjadi amalan yang diterima dan memperoleh pengiktirafan kehakiman. Hak pemberi serah hak untuk menyaman adalah dilindungi dan tiada keperluan dari segi undang-undang atau ekuiti untuk mencari kesalahan bank itu jika Worthy sendiri boleh menyaman dengan persetujuan bank itu, atau boleh menjadikan bank itu salah satu daripada defendan (lihat perenggan 33–34).

(5) Penyerahan hak itu adalah tidak wajar dari segi undang-undang dan akibatnya, penghakiman terhadap bank itu untuk jumlah RM13 juta, dan lain-lain tidak boleh dikekalkan (lihat perenggan 35).

(6) Juga jelas niat pihak-pihak bahawa surat ikatan penyerahan hak, dan lain-lain adalah sekuriti berterusan dan tidak bermaksud dijadikan dokumen-dokumen kontraktual utama. Ini dinyatakan dalam seksyen 5 surat ikatan penyerahan hak (lihat perenggan 36).

(7) Hakim patut membenarkan tuntutan bank itu terhadap Worthy dan penjamin-penjamin yang digunakan sebagai tuntutan balas berdasarkan pliding, keterangan dan undang-undang. Tiada keterangan telah dikemukakan oleh Worthy atau penjamin-penjamin tentang jumlah yang dipertikaikan berkaitan perjanjian kemudahan yang telah dibayar oleh mereka. Notis tuntutan ke atas penjamin-penjamin itu telah disampaikan menurut undang-undang dan hujah bank itu berhubung isu ini mempunyai merit (lihat perenggan 38).]]]]]

Notes

For cases on loan facilities, see 1(3) *Mallal's Digest* (5th Ed, 2011 Reissue) paras 3534–2535.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (refd)

Bank Utama (M) Bhd v Insan Budi Sdn Bhd [2009] 1 MLJ 148, CA (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 2 AMR 205, FC (refd)
Chuah Eng Khong v Malayan Banking Bhd [1998] 3 MLJ 97, FC (refd)
Go Dante Yap v Bank Australia Creditanstalt AG [2011] 4 SLR 559, CA (refd)
Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd [1989] 2 MLJ 149, SC (refd)
Keng Soon Finance v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457, PC (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)
Philleoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513 (refd)
Stavers v Curling (1836) 3 Bing NC 355; 132 ER 447 (refd)
Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd [1996] 3 MLJ 692; [1997] 1 CLJ 596, CA (refd)

Legislation referred to

Civil Law Act 1956 ss 4(3), 5
National Land Code
Stamp Act 1949

Appeal from: Civil Suit No S2–22–1061 of 2008 (High Court, Kuala Lumpur).

Ng Sai Yeang (Chong Juen Quan with him) (Raja, Darryl & Loh) for the appellant.
Yee Teck Fah (Ong Gek Lin with him) (Yee Teck Fah & Co) for the respondents.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant ('the Bank') appeals against the decision of the learned High Court judge who refused to enter judgment for the appellant against a claim for facility offered to the first respondent, Worthy Builders Sdn Bhd ('Worthy'), and entered judgment against the Bank for debt owing from third parties to Worthy on the ground that the Bank has breached its fiduciary duty of not carrying out Worthy's instructions to the Bank. The second and third respondents are guarantors to the facility agreement. Other defendants in the original suit by Worthy (as plaintiff) ie Warisan Nusa Sdn Bhd (Warisan) and KUB Realty Sdn Bhd (KUB) are not appealing.

[2] In the instant case, the Bank has given facility to Worthy in the sum of RM6m and as security for the facility has obtained an assignment of proceeds for work to be done by Worthy for the UMNO building, the details of which is set out in para 4 below. By the judgment of the court, the Bank had been made liable to pay to Worthy for the proceeds which Worthy is entitled to

receive for works done in relation to the UMNO building amounting to about RM13m. In addition, the Bank was not able to recover from Worthy the facility given. The benefit to Worthy is that it was able to get judgment relating to sum due from work done for the UMNO building to them through the Bank. In addition, Worthy has benefited by not paying the facility amount. That is to say, Worthy has been enriched by the judgment. As it stands, there is no judicial precedent similar to the facts of the instant case cited by the parties or dealt by the learned trial judge. We will further elaborate on this issue in great detail.

PARTIES

[3] The title of the suit of parties in the High Court as well as the Court of Appeal needs to be set out to appreciate their interest and claim without confusion.

[IN THE MATTER OF CIVIL SUIT NO: S2-22-1061-2008
IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR]
Between
WORTHY BUILDERS SDN BHD [248077-U] ... Plaintiff
And
1. MALAYAN BANKING BERHAD [3813-K] ... Defendants
2. WARISAN NUSA SDN BHD [286327-U]
3. KUB REALTY SDN BHD [394430-W]
And
1. WARISAN NUSA SDN BHD
2. KUB REALTY SDN BHD ...Third Party
(BY ORIGINAL ACTION)
AND
BETWEEN
MALAYAN BANKING BERHAD ...PLAINTIFF
AND
1. WORTHY BUILDERS SDN BHD [248077-U]...DEFENDANTS
2. LEE CHEE MENG
3. LOO KIM LANG
(BY COUNTERCLAIM)
IN THE COURT OF APPEAL OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO: W-02-1724-08/2013
BETWEEN

MALAYAN BANKING BERHAD [3813-K] ... APPELLANT

AND

1. WORTHY BUILDERS SDN BHD [248077-U] ... RESPONDENTS

2. LEE CHEE MENG

3. LOO KIM LANG

ORIGINAL ACTION

[4] In the original action, Worthy sued the Bank, Warisan and Nusa on the following basis, namely:

(a) KUB was awarded a contract to build UMNO building and KUB sub-contracted it to Warisan and Warisan sub-contracted it to Worthy;

(b) The Bank had given Worthy the banking facility in the sum of RM6,144,000 for the purpose of the contract;

(c) KUB had assigned contract proceeds to Warisan. Warisan had given an irrevocable letter to KUB to channel the assigned proceeds to the 'Warisan designated collection account in the Bank'. That is to say the assigned proceeds of KUB will not reach the hands of Warisan but will land in the designated collection account in the Bank;

(d) Warisan had given the irrevocable letter to KUB stated at (c) above because Worthy had instructed Warisan to pay the contract proceeds to 'Worthy's designated collection account in the Bank';

(e) Basically from (c) and (d) it must be noted there are two collection accounts, one for Warisan and the other for Worthy. The purpose was to allow the Bank to take money from Warisan's account and place it at Worthy's account and debit whatever dues for its facilities and pay the balance to Worthy (if any);

(f) In respect of (e) above, Warisan had given an irrevocable instruction to the Bank to the effect that, once the proceeds land into 'Warisan designated collection account', the Bank was to split the sum in the ratio of 9.5% to Warisan and 90.5% to Worthy. The 9.5% of Warisan sum was to be credited into Warisan's current account in the Bank whilst the 90.5% to be credited into 'Worthy's designated collection account';

(g) As KUB has already assigned its proceeds to Warisan, Warisan had by an unconditional and irrevocable letter instructed UMNO to pay the progress payments directly to 'Warisan designated collection account' in the Bank;

(h) For providing the facility to Worthy by the Bank, the Bank had obtained an assignment of all the proceeds to be received from Warisan as part of the security document. As usual, a power of attorney was given by

Worthy to the Bank basically to enforce whatever rights Worthy will have in collecting payments from Warisan. That is to say, the assignment and power of attorney gives the Bank the same rights as that of Worthy in any claim by Worthy against Warisan, subject to other terms of the facility agreement and provided the assignment had been duly notified to Warisan;

(i) The issue whether a proper notice of assignment has been given was highly contested in this action;

(j) Warisan also has assigned its proceeds coming from UMNO to the Bank and also executed a power of attorney in favour of the Bank in the same manner as Worthy's power of attorney, as described above;

(k) Worthy had in consequence of the facility agreement given unconditional and irrevocable letters of instruction to Warisan to remit progress claims directly to the 'Worthy designated account in the Bank';

(l) basically, if all progress payments due from UMNO had landed in the 'Warisan designated account' and split and placed in the 'Worthy designated account', there would not have been any default on the part of Worthy to the Bank. However, only some progress payments were paid into the designated accounts and there was also some payments made by Warisan directly to Worthy as per the evidence and admission of Worthy itself; and

(m) notwithstanding the fact that Worthy has not strictly followed the contractual arrangement and have also received payments directly from Warisan, Worthy had filed the suit on the basis that as Worthy and Warisan had assigned the contract proceeds with a power of attorney, in consequence, the Bank has a duty and obligation to sue Warisan as well as the relevant parties under Warisan assignment to the Bank using the power of attorney.

[5] Worthy's argument succeeded before the learned High Court judge and the learned High Court judge ordered the Bank, Warisan and KUB to pay Worthy a sum of RM13,122,807.09 and that part of the judgment reads as follows:

> the claim of the plaintiff, Worthy Builders Sdn Bhd ('Worthy/plaintiff) in the original action, was allowed and the first and second defendants, Malayan Banking Berhad ('Malayan Banking/first defendant') and Warisan Nusa Sdn Bhd (Warisan/second defendant) in the original action, respectively shall jointly and severally pay the plaintiff the sum of RM13,122,807.09 and interest at the rate of 5%pa from 19 July 2013 till full realisation.

[6] The claim of the Bank against Worthy and the guarantors for the facility provided was dismissed. And that part of the judgment reads as follows:

the claim of the first defendant/plaintiff, Malayan Banking by way of counterclaim against the first, second and third defendants, Worthy, Lee Chee Meng and Loo Kim Lang respectively, for:

(i) The sum of RM4,479,045.71;

(ii) Interest on the said sum of RM4,479,045.71 at the rate of 2.0% per annum above the 1st defendant's base lending rate on a daily rests basis and payable on the last day of each calendar month from 1/11/2008 till the date of full settlement (which base lending rate was at 6.75% per annum from 1/11/2008 until 30/11/2008 and thereafter as at 1/12/2008 and as to-date the base lending rate is at 6.50% per annum); and

(iii) Further interest on the said sum of RM4,479,045.71 at the rate of 1.0% per annum on a daily rests basis and payable on the last day of each calendar month from 1/11/2008 until the date of full settlement is dismissed.

[7] The learned trial judge, in respect of the Bank's claim against Worthy and the guarantors, at the early part of the judgment say why the Bank's claim cannot be allowed notwithstanding the fact that Worthy and/or guarantors had not disputed the sum in any material context according to law by replying to the letter of demand or in the pleadings. The learned judge, with respect, did not do a balancing exercise of claims and competing claims. The threshold burden is only on a balance of probabilities. The law requires that any party disputing a sum ought to protest at the earliest opportunity, and remaining in silence will not permit him, in law, to escape liability(see *Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692; [1997] 1 CLJ 596). By protesting to the claim, the court will be obliged to consider and arrive at a just amount, according to law. The learned judge's findings on the Bank's claim reads as follows:

4. At the outset, I find Malayan Banking's reliance in submission on the following 2 documents is misplaced as:

(a) Facility/Agreement dated 28/3/2007 (B/126-170)

(i) It is for an additional facility of RM1,000,000.00 upon terms and conditions therein contained and not upon terms and conditions contained in the Facility Agreement dated 6/9/2006;

(ii) It is not the subject matter of this action;

(iii) The 1st Defendant did not refer to the letter of offer dated 12/3/2007 to PW1 or the Guarantors during crossexamination and is thus not entitled to raise it in submission (*Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770);

(b) Letter of Guarantee dated 28/3/2007 (IDD2)(D/29-39)

(i) The 1st defendant's defence and counterclaim dated 16/12/2008 did not make reference to the 1st defendant's defence and counterclaim and is only in respect of the facilities of RM6,144,000.00 granted to the plaintiff on or about 6/9/2006;

(ii) The first defendant did not make any claim against the guarantors based on the Guarantee of 23 July 2007;

(iii) It is still an ID document, was not marked as an exhibit and is therefore not evidence before the court.

[8] The learned trial judge in finding in favour of Worthy had this to say:

5 I find there is merit in the plaintiff's contention that since the plaintiff was a customer of the 1st defendant as is evident from the Facilities referred therein, it was the duty of the first defendant to impliedly contract to exercise reasonable care and duty to ensure that the Master Contract Proceeds and Contract Proceeds are remitted to the said designated collection accounts with the 1st Defendant and that its acts will not injure the plaintiff. I draw support from:

(a) *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1, where the Federal Court held '*It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders*'.

(b) *Bank Utama (M) Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148, where the Court of Appeal in dismissing the appellant/defendant's (bank) appeal upheld the trial judge's finding that the plaintiff (customer) was entitled to claim against the defendant for breach of contract and negligence as a banker to fulfill its contractual obligation and duty of care owed to the plaintiff;

(c) Persuasive authority of *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559, where the Singapore Court of Appeal held '*Under the Account-Opening Documents, the respondent (bank) owed the appellant (customer) an implied contractual duty of skill and care in carrying out his instructions*'.

6 In so far as the duty of care owed by the second defendant to the plaintiff that it impliedly contracted to exercise reasonable care and duty to ensure that the Master Contract Proceeds and Contract Proceeds are remitted to the said designated collection accounts with the first defendant and that their acts or omission to act shall not injure the plaintiff, I have demonstrated it from the evidence alluded before and to avoid repetition, I rely on paragraphs 3.2, 3.4, 3.4.1, 3.5, 3.5.1, 3.9(a) & (b) and 3.11 above.

7 Applying the legal principles stated above to the factual matrix in this case, I find there is breach of the aforesaid duty by the 1st and 2nd defendants. This is supported by the following evidence and contemporaneous documents.

[9] The learned judge in her judgment sets out the facts and the law. In our considered view, with respect, there is grave error of law and the application of the law to the facts. The cases the learned trial judge had relied on have little relevance to the facts of the instant case and on the law on assignment of this nature (security documents). The cases relied on by the learned trial judge, namely: (a) *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1; (b) *Bank Utama (M) Bhd v Insan Budi Sdn Bhd* [2009] 1 MLJ 148; (c) *Go Dante Yap v Bank Australia Creditanstalt AG* [2011] 4 SLR 559, have no relevance to the deeds of assignment and powers of attorney which had been executed as security documents and/or collaterals for the facility granted by the Bank.

[10] In our considered view, the learned trial judge's proposition or the ratio decidendi, if sustained, will result in this: security documents secured by banks in granting facility will become 'documents of liability'. This ultimately, will affect the banking industry in an unprecedented manner. Courts have repeatedly emphasised that judgments relating to commercial case must promote 'commercial certainty'. The common sense approach is also another factor which needs to be taken into account in a situation of lender and borrower. For example, the Privy Council in *Keng Soon Finance v M K Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 applied the 'common sense approach' when it dealt with facility documents.

THE THREE CASES AND JURISPRUDENCE RELATING TO SECURITY DOCUMENTS

[11] In general, a security document means a document that provides a security interest in the property or asset (whether tangible or intangible) that is pledged as collateral. In the event the borrower defaults, then the security document is acted upon at the discretion of the lender to salvage whatever losses incurred. In essence, the security document does not form the primary contractual relationship between the lender and the borrower. It only comes into effect when there is a default.

[12] The three cases which the learned trial judge had relied on had nothing to do with the security documents. These cases relate to primary contractual documents and the terms of its breach. The case of *Abdul Rahim Abdul Hamid* dealt with contractual relationship and terms of the agreement which may trigger an implied duty to take reasonable skill and care in executing customers' orders. The Federal Court in that case, inter alia, held:

> (3) The 'relationship of banker and customer begins the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be part of the process and lead directly to agreement; negotiations without agreement cannot establish the relationship'.

Prior to the execution of the facility agreement there was negotiation as evidenced by the working draft and which terms were supposed to be incorporated into the facility agreement. Hence, even before the execution of the facility agreement there was already a relationship formed between the parties. Failure by PW2 to inform DW1 on the variations made or the departure from the agreed terms in the working draft amounted to a fundamental breach of duty of care on the part of PW2 and vicariously, the 1st respondent.

(4) It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders.

[13] The case of *Bank Utama* also did not deal with 'security documents' and/or collateral. The issue relates to a primary contractual document and the consequence of its breach. The Court of Appeal on the facts, inter alia, held:

When the defendant breached its contractual duty of care in sending the STT and breached the contract of 16 February 1995, Arrow Agencies terminated its contract with the plaintiff. It follows therefore that the defendant was not entitled to get the amount claimed in its counterclaim.

[14] The case of *Go Dante Yap* also has nothing to do with security documents. The contractual breach relates to primary contractual documents. On the facts, the Singapore Court of Appeal, inter alia, held:

5 Under the Account-Opening Documents, the respondent owed the appellant an implied contractual duty of skill and care in carrying out his instructions: at [24] and [25].

6 Applying the test in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, the respondent owed the appellant a duty of care in the tort of negligence because there was a sufficient degree of legal proximity between the parties to give rise to a prima facie duty of care, and there were no policy considerations militating against the imposition of a duty of care in tort: at [26] to [29], [34], [35], [38], [39], [41] and [42].

[15] The principles stated in the above three cases are well established principles in respect of primary contractual documents. The learned trial judge, in attempting to use the three cases as an analogy for 'security documents', is like comparing an apple with an orange. Such an analogy, if sustained by this court, will create chaos to contractual relationships relating to 'security documents'.

JURISPRUDENCE RELATING TO ASSIGNMENT IN MALAYSIA

[16] To appreciate the problem in hand the jurisprudence relating to assignments in relation to landed property as well as chose in action (intangible

property) has to be revisited in the right perspective within the parameters of the development of case laws in Malaysia.

[17] An assignment in the context of real and personal property (chose in action) generally means a transfer of rights by the legal and/or beneficial owner (assignor) in real or personal property to another person (assignee). The assignee becomes the legal and/or equitable owner of the property. This mode is executed by way of a deed of assignment.

[18] Under our Torren System, legal rights in landed property cannot be transferred just by a deed of assignment. It has to go through the process of registration in the land office and finally the title of the landed property must be endorsed with the assignee's name to state that the assignee is the legal owner of the property. The assignee's name, when endorsed in the title, will acquire a right in 'rem' in the landed property. If his name is not endorsed, he will only have an equitable interest in the landed property and if he wants to perfect his equitable right to legal right he must go through the process set out in the National Land Code or seek the assistance of the court.

[19] For example, if a registered and legal owner of landed property who has misplaced his title to the land wants to sell the property immediately for cash he can do it by way of a deed of assignment and by giving an irrevocable power of attorney (to give all rights of the assignor) to the assignee to perfect the title, ie by getting it registered in the land office by complying with the procedure set out in the National Land Code, Stamp Act, etc; or by recourse of seeking the assistance of the court. In this example, the notice procedure of the assignment is irrelevant.

[20] An example, where the notice procedure becomes relevant in banking facilities, and is often used, is in a case where a property is purchased from a developer who holds a master title and agrees to sell the property to various purchasers with an undertaking that the developer will secure individual titles for the purchasers. The purchaser, in order to secure a loan from a bank to finance the property, as a security for the loan, will, by a deed of assignment, assign the property purchased to the bank. But that does not mean the purchaser has transferred the property to the bank and that the bank can deal with the property in any manner as it deems fit. Whether it is an equitable assignment or an absolute assignment or a legal assignment, usually, under the facility agreement the bank will be obliged to reassign the property to the purchaser without default and upon payment of the facility sum. That is to say the right to redemption is an entrenched right. In *Chua Eng Khong v Malayan Banking Bhd* [1998] 3 MLJ 97, the Federal Court had this to say:

> At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title

and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-andout purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code 1965 ('the NLC'). It is true that nowhere in the said loan agreement has the word 'mortgage' been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower 'shall be entitled ... to obtain a discharge and release of the said lot from the lender' (see cl 27 of the said loan agreement). Thus, we have the loan, the contractual right to repay or to redeem the said land and the assignment of all 'right, title and interest' in the said land pending the exercise of such contractual right to redeem. The said loan agreement, therefore, at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial, provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage; see *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at p 462.

If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land notwithstanding the said assignment, but the borrower is, but subject to the mortgage, and the lender is a mere 'incumbrancer'. The equity of redemption arises as soon as any document, on a true construction, found to be a mortgage. The use of the word 'mortgage' may sound like sacrilege in view of the presence of the NLC which does not use the word, especially to a legal man who specialises in 'common law' but not to one who is familiar with 'chancery practice'. for to the latter, despite the assignment, the borrower is still the owner of the said land subject to the mortgage.

[21] What must be said here is the law requires the notice of assignment to be given to the developer pursuant to s 4(3) of the Civil Law Act 1956 ('the CLA') failing which in the event of default of the loan the Bank will not be able to get a good equitable title to sell the property to a third party by private treaty and/or public auction and secure a good title for the intending purchaser. Section 4(3) of the CLA states:

Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date

of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[22] The problem in the above example of assignment will arise when the developer fails to fulfill its obligation under the sale and purchase agreement in not building and/or completing the construction of the property. Is the obligation on the bank to sue the developer? Or, must it be on the purchaser? As it stands, the courts have said that the purchaser upon entering into a deed of assignment will not have locus to sue and must get the consent from the bank to sue (see *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ 149; *Philleoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513; *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 2 AMR 205). What the courts have not said so far is that the bank has a duty to sue the developer and protect the interest of the purchaser. The net effect of the High Court's decision in the instant case, though it is not related to landed property, if sustained, will mean that the bank has a duty to sue. That has not been part of our jurisprudence and/or semblance of jurisprudence in England and/or other Commonwealth jurisdiction, when the deed of assignment forms part of a security document.

[23] A deed of assignment relating to 'chose in action', such as the instant case, strictly must comply with the notice procedure for it to be effective. A difficulty in 'chose in action' assignment will arise when at the date of assignment the debt has not been crystallised.

[24] For example, where A owes B RM1m and B assigns the said sum to C and has given proper notice of assignment, then A is obliged to pay the RM1m to C and not to B and in default C can sue A for the said sum. The law here is quite straightforward.

[25] However, when A (developer) does not owe B (contractor) currently but will be liable to pay B for the work done in the future based on a building contract, then the debt has not crystallised. In practice B can still assign his rights to the purported proceeds under the building contract to C. That does not mean C can sue A immediately. And even if B has completed the work as per the contract but not to the satisfaction of A, that does not mean A must pay C based on the deed of assignment. In such instance, it will be evidentially difficult for C to prove that B has done the work without the assistance of B.

[26] The instant case relates to a chose in action as stated above and when it was assigned the debt has not crystallised. However, the learned trial judge had held that there is an implied contractual duty on the Bank to sue and recover

the sum when evidentially the Bank may never be able to establish its claim. There are no decided cases where courts in similar circumstances had held that the Bank is obliged to sue when the deed of assignment was given purely as a security for the facility, and that too, an inchoate chose in action where the debt has not crystallised at the date of assignment.

[27] The real issues in the instant case are whether the relevant assignment deeds and the power of attorney will, in law, place an obligation on the Bank to act to recover the proceeds contractually and/or as a fiduciary. And whether the learned trial judge in essence, can dismiss the claim of the Bank when the issue of liability is not in dispute and when the said sum of RM1m which the learned trial judge says had been wrongly taken into account is not part of the claim of the appellant; and whether the learned trial judge can rule that the certificate of indebtedness is bad and not sustainable in law when there is sufficient evidence to support the certificate of indebtedness and when the defendant's defence is silent as to the issue of quantum. And whether the demand procedure against the guarantors was duly complied with according to law.

[28] We have read through the relevant evidence and contrasted it with the appellant's as well as the respondents' submission. We find merit in the appellant's complaint.

[29] We have read the appeal records and the submissions of the parties in details. We take the view that the appeal must be allowed and the judgment against the Bank must be set aside and the claim of the Bank must be allowed. Our reasons, inter alia, are as follows:

(a) in the instant case, the learned trial judge, in making a finding in favour of Worthy, in respect of the sum of about RM13m claim, anchors on the following proposition of law:

> It was the duty of the first defendant (Bank) to impliedly contract to exercise reasonable care and duty to ensure that the master contract proceeds and contract proceeds are remitted to said designated collection asserts with the first defendant and that its acts will not injure the plaintiff (Worthy).

(b) the facility agreement makes it clear that (1) the deed of assignment of contract proceeds; and (2) the deed of assignment of master contract proceeds are only security for the facilities. The three cases which the learned trial judge had relied on to make an analogy and to make the Bank liable relate to the primary contractual agreements and not relating to security documents. In *Stavers v Curling* (1836) 3 Bing NC 355; 132 ER 447, Tindal CJ at p 368 stated that:

> ... The question whether covenants are to be held dependant or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to

each particular case; to which intention, when once discovered, all technical forms of expression must give way.

(see *Keng Soon Finance Bhd v M K Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457).

(c) We do not wish to labour on explaining what a security for the facility means except to rely on an extract from Anandan Krishnan 'Words, Phrases & Maxims, Lexis Nexis 2008, Vol 13, R,S at pp 506–507 which reads as follows:

> Speaking generally, security is anything that makes the money more assured in its payment or more readily recoverable as distinguished from eg. a mere IOU which is only evidence of a debt. The word is not confined to a document which gives a charge on specific property but includes personal securities for money. (*Chetumal v Noorbhoy 107 IC 213,* AIR 1928 Sind 89). A 'security' is an encumbrance, vested in a creditor, over the property of his debtor, for the purpose of securing the repayment of the debt. It is a right in the property of another, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, to realize it from that property, the fulfillment, or enjoyment, of some other right vested in its owner. Securities may be classified into:
>
> (i) Mortgages;
>
> (ii) Pawns;
>
> (iii) Floating charges;
>
> (iv) Liens (Singhal's Jurisprudence)
>
> This word has a variety of meaning:
>
> (i) The general name for all mortgages, charges, debentures, etc whereby repayment of money is assured or secured;
>
> (ii) Any document by which any claim may be enforced.

[30] From the available authorities only upon default of the borrower, the securities become enforceable and there is no legal obligation to enforce the securities immediately upon default. We have perused the facility agreement, and the security documents several times, and we are not able to find any provision that stipulates that, upon default of Worthy or other parties, the Bank must act immediately upon the security documents and/or was obliged in law to act upon the instruction of Worthy to realise their debts through the security documents.

[31] In the instant case, it is not in dispute that Worthy did not give 'notice of assignment' in the manner as per the form agreed by the parties, as set out in the First Schedule to the deed of assignment of contract proceeds. Neither was there evidence to say the lender had consented to the variation of the notice of

assignment. The relevant clause of sections 2 and s 3 in the deed of assignment is found at p 641 of the appeal record and it reads as follows:

> Section 2 Notice of Assignment Cum Instruction
>
> For the purpose of affectuating this Deed of Assignment, the Assignor shall deliver to the Main Contractor a notice of assignment cum irrevocable letter of instruction substantially in the form set out in First Schedule hereof or such other form and content as may be determined by the Lender at its absolute discretion (hereinafter referred to as 'Notice of Assignment Cum Instruction') to notify the Main Contractor to remit the Contract Proceeds into the designated collection account with the Lender.
>
> Section 3 Acknowledgment by the Main Contractor
>
> The Assignor shall also procure the Main Contractor's acknowledgment of receipt of the Notice of Assignment Cum Instruction by endorsing on the copy of the said Notice of Assignment Cum Instruction which acknowledgment also signifies the Main Contractor's agreement to be bound by the instruction therein and such acknowledgment copy of the Notice of Assignment Cum Instruction.

[32] It is our considered view that the assignment notice was not in compliance with sections 2 and 3 stated above. In consequence, the assignment is bad in law and the learned trial judge should not have spent much judicial time to give life to a 'sterile assignment' without strict satisfactory evidence that the provision of sections 2 and 3 have been complied with.

[33] It must also be emphasised that the deed of assignment which is intended as a security document, does not prohibit the assignor (Worthy) from obtaining the consent from the assignee to sue the debtor and it has been the accepted practice and have obtained judicial recognition. The Malaysian jurisprudence has been explained in Janab's *Key To Civil Procedure* (2012) 5th Ed at pp 147–148, in detail. A part of the relevant pages read as follows:

> Where an assignor has assigned all his interest in a property absolutely to the assignee, the assignor will not be entitled to initiate an action as owner of the property for any reason whatsoever after the date of the assignment. However, an action can be brought in the name of the assignee or by the assignee in the name of the assignor. Section 4(3) of Civil Law Act 1956 states:
>
> > Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same,

and the power to give a good discharge for the same, without the concurrence of the assignor.

In *Nouvau Mon Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 the appellant, to finance a purchaser of a shop office unit from a developer, assigned all his interest in the said property to the Public Bank Bhd. Subsequently, he brought proceedings for some declaratory relief against the respondent who had purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. A preliminary objection was taken by the respondent on the ground that the appellant could not maintain the action as he had assigned the property absolutely. The trial judge upheld the objection.

On the appeal to the Federal Court, the court held that the document in this case was an absolute assignment not purporting to be a charge only within the meaning of s 4(3) of the Civil Law Act and therefore the appellant was not competent to maintain the action when it was filed. Further, the court stated that whether or not an agreement is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself. Where the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s 4(3) of the Civil Law Act 1956, the assignor was not entitled to sue in his own name but the action must be brought by the assignee in its own name or by the assignee in the name of the assignor.

[34] The cases such as (a) *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268; (b) *Hipparion (M) Sdn Bhd v Chung Khiaw Bank Ltd* [1989] 2 MLJ, all recognise the right of the assignor to sue independently of the right of the assignee. That is to say, the assignor's right to sue is protected and there is no necessity in law or equity to find fault with the Bank when Worthy itself could have sued with the consent of the Bank, or could have made the Bank one of the defendants. The learned trial judge, with respect, had failed to consider this part of the jurisprudence relating to assignment.

[35] In our considered view the assignment is bad in law and in consequence, the judgment against the Bank for the sum of about RM13m, etc cannot be sustained.

[36] It is also clearly the intention of the parties that the deed of assignment, etc are continuing security and were never meant to be the primary contractual documents. This is set out in section 5 of the deed of assignment found at appeal record, Part C Vol 1 p 641, which reads as follows:

This assignment is expressly intended to be and shall be a continuing security for the secured amounts and all moneys whatsoever now or hereafter from time to time owing to the lender by the assignor whether alone or jointly and severally with another or others and whether as principal or surety notwithstanding that the assignor may at any time or times cease to be indebted to the lender for any period

A or periods and notwithstanding that the accounts of the assignor with the lender may from any cause whatsoever cease to be current account or accounts and notwithstanding any settlement of account or accounts or otherwise.

B **[37]** In the instant case, it is not in dispute that Worthy did not give 'notice of assignment' in the manner as per the form agreed by the parties, as set out in the First Schedule to the deed of assignment of contract proceeds. Neither was there any evidence to say the lender had consented to the variation of the notice of assignment.

C **[38]** In the instant case, the learned trial judge ought to have allowed the Bank's claim against Worthy and the guarantors anchored as a counter claim based on the pleadings, evidence and the law. We note no evidence was adduced by Worthy or the guarantors of the disputed sum relating to the facility agreement which they have to pay. In *Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd* [1996] 3 MLJ 692; [1997] 1 CLJ 596, the Court of Appeal held:

D

> While it is true that the burden is on a party who asserts that he has sustained damages to prove the fact, this does not absolve the opposite party from adducing evidence in rebuttal. Once, as here, evidence that is prima facie credible has been led by one party, it is for his opponent to lead evidence to prove that the assertions made are not correct. The appellant, however, chose not to do so and was content to sit back and merely ask the respondent to prove damages.

E

F **[39]** We have perused the evidence and the pleadings and we are satisfied the demand notices on the guarantors were served according to law and the submission of the Bank on this issue has merit.

G **[40]** In consequence, the appeal is allowed and the judgment against the Bank by the High Court is set aside. In addition, the counterclaim of Bank against Worthy and the guarantors is allowed as per prayers 35.1, 35.2 and 35.3 with costs.

We hereby order so.

H *Appeal allowed and counterclaim of Bank allowed with costs.*

Reported by Kanesh Sundrum

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